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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LENDRICK V. BROWN,) Case No. CV 11-05062 DDP (MANx)
)
Plaintiff,) **ORDER GRANTING DEFENDANTS' MOTION**
) **TO DISMISS**
v.) [Motions filed on June 22, 2011]
)
WACHOVIA MORTGAGE CORP.,)
NDEX WEST LLC, WELLS FARGO)
BANK, N.A., MORTGAGE)
ELECTRONIC REGISTRATION)
SYSTEMS, INC. (MERS),)
)
Defendants.)
)
_____)

Presently before the court is Wachovia Mortgage, a division of Wells Fargo Bank, N.A, and MERSCORP, INC.'s (together "Defendants'") Motion to Dismiss Case (Dkt. No. 6) and Motion to Strike Portions of Complaint (Dkt. No. 8). Having considered the parties papers and the arguments therein, the court GRANTS Defendants' Motion to Dismiss. Defendants' Motion to Strike is VACATED as moot.

I. Background

In January 2007, Plaintiff obtained a \$300,000 home loan from then World Savings Bank, FSB, for the purchase of real property

1 located at 4169 Charlene Dr., Los Angeles, California. (Def.'s
2 Request for Judicial Notice ("RJN"), Ex. A, Ex. B.) On or about
3 July 23, 2009, Plaintiff entered into a loan modification purchase
4 agreement with defendant, Wachovia Mortgage Corp. (Compl. ¶ 8.)
5 At some point thereafter, Plaintiff defaulted on his loan and on
6 December 8, 2010, a notice of default ("NOD") was recorded with the
7 Los Angeles County Recorder's Office. (Compl. ¶ 17; RJN, Ex. G.)
8 On March 23, 2011, Plaintiff filed for bankruptcy under Chapter 7
9 of the United States Bankruptcy code. (RJN, Ex. H, Chapter 7
10 Voluntary Bankruptcy Petition.) On April 28, 2011, Plaintiff
11 brought this suit for damages and to enjoin the foreclosure of his
12 home.

13 **II. Legal Standard**

14 Under the Federal Rule of Civil Procedure 12(b)(6), a
15 complaint is subject to dismissal when the plaintiff's allegations
16 fail to state a claim upon which relief can be granted. When
17 considering a 12(b)(6) motion to dismiss for failure to state a
18 claim, "all allegations of material fact are accepted as true and
19 should be construed in the light most favorable to [the]
20 plaintiff." Resnick v. Hayes, 213 F.3d 433, 447 (9th Cir. 2000).

21 In Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009), the
22 Supreme Court explained that a court considering a 12(b)(6) motion
23 should first "identify[] pleadings that, because they are no more
24 than conclusions, are not entitled to the assumption of truth."
25 Id. Next, the court should identify the complaint's "well-pleaded
26 factual allegations, . . . assume their veracity and then determine
27 whether they plausibly give rise to an entitlement to relief."
28 Id.; see also Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th

1 Cir. 2009) ("In sum, for a complaint to survive a motion to
2 dismiss, the non-conclusory factual content, and reasonable
3 inferences from that content, must be plausibly suggestive of a
4 claim entitling the plaintiff to relief" (internal quotation marks
5 omitted)).

6 **III. Discussion**

7 Plaintiff brings claims for fraud, violation of California's
8 False Claims Act, violation of the Federal Racketeer Influenced and
9 Corrupt Organizations Act ("RICO") statutes, and violation of
10 various provisions of the California Civil Code and the California
11 Government Code.

12 **A. Chapter 7 Bankruptcy**

13 In March 2011, Plaintiff filed for Chapter 7 Bankruptcy.
14 (RJN, Ex. H, Chapter 7 Voluntary Bankruptcy Petition.) Defendants
15 argue that because Plaintiff filed the present action after he
16 filed for Chapter 7 Bankruptcy, Plaintiff's claims are "property of
17 the bankruptcy estate," and therefore must be dismissed. (Def.'s
18 Motion to Dismiss 3:23-27.) The court agrees.

19 As set forth in 11 U.S.C. § 541(a)(1), the commencement of a
20 Chapter 7 case, such as the present, "creates an estate," and that
21 estate is comprised of "all legal or equitable interest of the
22 debtor in property as of the commencement of the case." Put
23 another way, "after a person files for bankruptcy protection, any
24 causes of action previously possessed by that person become the
25 property of the bankrupt estate." Cloud v. Northrop Grumman Corp.,
26 67 Cal. App. 4th 995, 1001 (1998) (citing United States v. Whiting
27 Pools, Inc., 462 U.S. 198, 203-205, fn. 9 (1983)); see, e.g., In re

1 Lopez, 283 B.R. 22, 28 (2002) (noting that the action at issue
2 "belongs to the estate, not to [the plaintiff]").

3 Here, Plaintiff's causes of action became the property of the
4 Bankruptcy Estate on March 23, 2011, the date when Plaintiff
5 petitioned for Chapter 7 bankruptcy. See In re Lopez, 283 B.R. at
6 28 (explaining that an "Action bec[omes] property of the bankruptcy
7 estate as of the Petition Date, even though the Action was not
8 listed in the schedules, and the property that is neither abandoned
9 nor administered remains property of the estate even after the case
10 is closed"). Plaintiff, therefore, lacks standing to bring this
11 suit and the suit must be dismissed for failure to state a claim.
12 Because further amendment would not cure this jurisdictional
13 defect, the court dismisses Plaintiff's complaint with prejudice.

14 **B. Tender**

15 Under California law, "an action to set aside a trustee's sale
16 for irregularities in sale notice or procedure should be
17 accompanied by an offer to pay the full amount of the debt for
18 which the property was security." Ferguson v. Avelo Mortg.,
19 L.L.C., 126 Cal. Rptr. 3d 586, 591 (Cal. Ct. App. 2011) (quoting
20 Arnolds Mgmt. Corp. v. Eischen, 205 Cal. Rptr. 15, 17 (Cal. Ct.
21 App. 1984)); see also FPCI Re-Hab 01 v. E & G Invs., 207 Cal. App.
22 3d 1018, 1021 (1989). Here, Plaintiff seeks equitable relief,
23 including an injunction, declaratory relief, quiet title, a
24 constructive trust, and an equitable lien in connection with
25 Plaintiff's claims challenging the foreclosure sale. Plaintiff,
26 however, has failed to allege a tender of payment or offer any
27 proof of his ability to tender. Plaintiff's complaint with respect

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1 to these equitable claims challenging the foreclosure of his home
2 must be dismissed for this reason as well.

3 **C. The Home Owner's Loan Act**

4 Finally, Plaintiff has brought various state claims related to
5 alleged irregularities in the processing of Plaintiff's mortgage.
6 The Home Owners' Loan Act of 1933, 12 U.S.C. § 1461 et seq.
7 ("HOLA") and regulations promulgated by the Treasury Department's
8 Office of Thrift Supervision ("OTS"), 12 C.F.R. § 560, preempt
9 Plaintiffs' state law claims. (Defendants' Motion to Dismiss
10 Plaintiffs' First Amended Complaint, ("Def.'s Motion") 4: 5-12.)

11 Pursuant to HOLA, OTS is authorized "to prescribe a nationwide
12 system of operation, supervision, and regulation which would apply
13 to federal [savings] associations." Glendale Fed. Sav. & Loan
14 Ass'n v. Fox, 459 F. Supp. 903, 909 (C.D. Cal. 1978). Acting under
15 such authority, OTS promulgated 12 C.F.R. § 560.2(b), which
16 provides for preemption of state laws that impose upon federal
17 savings banks any requirements regarding "terms of credit, . . .
18 [d]isclosure and advertising, . . . [or][p]rocessing, origination,
19 servicing, sale or purchase of . . . mortgages." 12 C.F.R. §
20 560.2(b)(4,9-10).

21 In Silvas v. E*Trade Mortgage Corp., 514 F.3d 1001 (9th Cir.
22 2008), the Ninth Circuit described HOLA as "so pervasive as to
23 leave no room for state regulatory control." Id. at 1004-1005
24 (internal citation omitted). The court explained that "because
25 there has been a history of significant federal presence in
26 national banking, the presumption against preemption of state law
27 is inapplicable" in the banking context. Id. at 1004-1005
28 (internal citation omitted).

1 The court finds a comparison with Rivera v. Wachovia Bank,
 2 instructive. Rivera v. Wachovia Bank, No. 09-0433, 2009 WL 2406301
 3 (S.D. Cal. Aug. 4, 2009). In Rivera, the court found that
 4 plaintiff's allegations that Wachovia induced him to sign loan
 5 documents without adequate disclosures in regard to the interest
 6 rate and its adjustment over time in violation of state law were
 7 expressly the type of lending activity regulations Congress sought
 8 to preempt. Rivera, 2009 WL 2406301 at *2. Similarly, in Andrade
 9 v. Wachovia Mortgage, the court ruled that the plaintiff's state
 10 law based fraud, injunctive relief, and quiet title claims were
 11 expressly preempted by HOLA. Andrade v. Wachovia Mortgage, 2009 WL
 12 1111182, No. 09-0377 (S.D. Cal. April 21, 2009). The Andrade court
 13 reasoning that:

14 Plaintiff's allegations revolve entirely
 15 around the "processing, origination, [and]
 16 servicing" of the Plaintiff's mortgage,
 17 including the "terms of credit" offered, the
 18 "loan-related fees" charged, and the adequacy
 19 of disclosures made by Defendants in
 20 soliciting and settling the loan. 12 C.F.R. §
 560.2(b)(4), (9), (10). Because the state
 laws on which Plaintiff relies, as applied,
 would regulate lending activities expressly
 contemplated by § 560.2(b), the claims are
 preempted.

21 Andrade, 2009 WL 1111182 at *3.

22 In the present action, Plaintiffs' claims are difficult to
 23 discern and are not pled with particularity. However, it appears
 24 that Plaintiffs broadly assert that Defendants engaged in fraud in
 25 the initial loan disclosure, loan-related fees, origination,
 26 processing, and servicing of Plaintiffs' mortgage. (See, e.g.
 27 Compl. ¶ 41, 43, 50, 52). The court must resolve any doubt in
 28 favor of preemption. Weiss v. Washington Mutual Bank, 147 Cal.

1 App. 4th 72, 77 (2007). To the extent that Plaintiffs' state law
2 claims for fraud relate to the "processing," "disclosure,"
3 "origination," and/or "sale or purchase of" the mortgage, they are
4 preempted and therefore dismissed. 12 C.F.R. § 560.2(b)(10).

5 **IV. Conclusion**

6 For the reasons set forth above, Defendants' Motion to Dismiss
7 Case is GRANTED, Plaintiff's Complaint is DISMISSED with prejudice.
8 Defendant's Motion to Strike is VACATED as moot. In addition, the
9 Scheduling Conference set for October 17, 2011 is vacated.

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15 IT IS SO ORDERED.

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18 Dated: September 16, 2011

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DEAN D. PREGERSON
United States District Judge